Editor's note: 78 I.D. 300; distinguished by Kristeen J. Burke, 20 IBLA 162 (May 5, 1975)

HAROLD J. NAUGHTON

IBLA 70-119 Decided September 13, 1971

Alaska: Indian and Native Affairs--Alaska: Land Grants and Selections--Indian Allotments on Public Domain: Lands Subject to--Indian Allotments on Public Domain: Settlement--Withdrawals and Reservations: Effect of

No rights are acquired under the Alaska Native Allotment Act, 48 U.S.C. §§ 357, 357a, 357b (1958) by a native who purportedly commenced his occupation of the land at a time when the land was withdrawn from all forms of appropriation and where after the withdrawal was revoked, the land was opened only for the filing of State selection applications.

Alaska: Grazing--Indian Allotments on Public Domain: Lands Subject to--Indian Allotments on Public Domain: Settlement

Settlement on land in Alaska which is subject to a grazing lease issued under the Alaska Grazing Act of March 4, 1927, 48 U.S.C. §§ 471, 471a-471o (1958) does not create any rights, by virtue of such settlement, under the Alaska Native Allotment Act, 48 U.S.C. § 357, 357a, 357b (1958), since such land is segregated from adverse appropriation at least until the Department takes action to cancel the grazing lease.

IBLA 70-119

Alaska: Grazing--Alaska: Statehood Act--Alaska: Land Grants and Selections

Although the existence of a grazing lease, issued under the Act of March 4, 1927, 48 U.S.C. §§ 471, 471a-471o (1958) is effective to bar settlement of the land covered thereby, it does not preclude the filing of a State selection application for the land, which, when filed, segregates the land from all appropriations based upon application or settlement or location.

3 IBLA 238

IBLA 70-119	:	AA-2805
HAROLD J. NAUGHTON	:	Native allotment
	:	application rejected
	:	Affirmed

DECISION

Harold J. Naughton has appealed to the Secretary of the Interior from a decision dated December 29, 1969, by which the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Bureau's Alaska State Office dated May 15, 1969, rejecting his native allotment application, AA-2805, filed pursuant to the Native Allotment Act of May 17, 1906, as amended, 48 U.S.C. § 357, 357a, 357b (1958).

The basis for the decision appealed from was that a portion of the land sought by the appellant (hereinafter called the north part) had been withdrawn at the time of settlement, and after the withdrawal was revoked, the land was opened only to State selection; and as to the remainder of the land (hereinafter called the south part) the rejection was sustained on the basis that the land was in a grazing lease, issued under the act of March 4, 1927, 48 U.S.C. §§ 471, 471a-471o (1958) and was not available for settlement until so ordered by the Bureau of Land Management.

Appellant's contentions on appeal are essentially as follows:

1. He claims occupancy of the land from 1950, which predates the selection of the area by the State of Alaska.

2. Selection of the land by the State violates the protection afforded rights of natives under the Constitution of the State of Alaska.

3. The Alaska Grazing Act of March 4, 1927, 48 U.S.C. §§ 471, 471a-471o (1958) guarantees the use of land by natives.

4. The State of Alaska conceded that its selections are subject to native rights.

Appellant filed his native allotment application on June 23, 1968, for approximately 160 contiguous acres of land on the shore of Kalsin Bay, Kodiak Island, Alaska, together with a petition for deletion of the land applied for from a grazing lease. According to a map attached to the application, the land applied for covers parts of sections 23-26, T. 29 S., R. 20 W., Seward Mer. 1/

1/ On July 23, 1971, appellant filed an amended legal description. The difference in the two descriptions is of no consequence to the decisions rendered below or to this decision.

Even taking appellant's claim of occupancy at its face value, it does not appear, as shown below, that it vested him with any rights to the land.

The records show that on June 14, 1941 by Executive Order 8789, 3 CFR 952 (Cum. Supp. 1938-1943) the north portion was withdrawn from all forms of appropriation. On April 20, 1956, by Public Land Order 1297 (21 F.R. 2981) the withdrawal was revoked as to such land, inter alia, but the order provided that the lands would not be open to appropriation until so ordered by the authorized officer of the Bureau of Land Management. On June 24, 1968 (Order No. AA-2717, 33 F.R. 9309), the lands were opened only to the filing of State selection applications. Withdrawn lands are not subject to the initiation of rights by settlement under the Indian allotment laws. See Donald Miller, 2 IBLA 309 (1971); Theodore A. Velanis, A-30953 (March 7, 1969). Since the lands have not been opened to settlement, no rights could accrue to the settler until such restoration takes place. See Sol. Op., M-36078 (May 16, 1951). Therefore, at no time during the asserted occupancy did the appellant gain any rights by virtue of his occupancy of the land.

The south part of the lands sought was withdrawn on February 10, 1940, by Executive Order No. 8344, 3 CFR 618 (Cum. Supp. 1938-1943) and they remained withdrawn from settlement until

December 26, 1961, when they were opened to entry generally pursuant to Public Land Order No. 2417, 26 F.R. 5926 (July 1, 1961). The withdrawal precluded the initiation of a settlement right during that period. In addition, all the lands applied for have been in a grazing lease, A-7916, issued in 1932 for a term of 20 years, renewed in 1952 for an additional 20 years, and renewed on April 8, 1971, to expire December 31, 1997. All of the lands are included in State selection application, A-062768, filed (as to these lands) on February 15, 1967.

The impact of the grazing lease and State selection application warrant discussion. As indicated earlier, the grazing lease is extant and has been since 1932. In discussing the effect of such a grazing lease, issued under the Act of March 4, 1927, the Associate Solicitor for Public Lands stated in M-36453 (July 23, 1957) in part as follows:

> It is clear that under the Act, the potential grazing use of public land in Alaska was made subordinate to its use for other more beneficial purposes and to development of its resources. But once a grazing lease had issued, it was the Act's purpose to protect the stockman in his use of the land to the extent indicated by the regulations and by the terms of his lease. To provide such protection, and particularly in view of the provisions of Sections 4 and 11 of the Act, the issuance of a grazing lease, except as to mining location, must be considered as an appropriation, segregating

> the leased lands from the remainder of the public domain so as to prevent unfettered entry thereon, at least until adverse action excluding the land from the lease had been taken. [Emphasis supplied.]

See William R. C. Croley, A-30673 (May 11, 1967) and 43 CFR 4131.3-1. That regulation essentially reiterates the principle enunciated in the Associate Solicitor's opinion. It follows, therefore, that the appellant's use of both the north and south portions was unauthorized and did not give rise to any rights. As indicated above, the south portion would have become available for settlement by Public Land Order No. 2417 of June 26, 1961, but for the existence of the grazing lease. However, on February 15, 1967, the State of Alaska amended its selection application to include both the north and south portions. Although the State's application was not operative as to the north portion because it was not open to such application until the order of June 24, 1968, became effective, the State's application did segregate the south portion from all appropriations based upon application or settlement or location, by the force of 43 CFR 2222.9-5 (1968), now 43 CFR 2627.4(b). 2/ Cf. Udall v. Kalerak, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969).

2/ The pertinent part of 43 CFR 2222.9-5(b) (now 43 CFR 2627.4(b)), provides:

"Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office. . . ."

In the light of our earlier holdings, we need not decide whether the appellant's showing of settlement constitutes satisfactory evidence to meet the statutory and regulatory criteria. 3/

It is our view that the selection of the land by the State of Alaska is not violative of the State's Constitution since the appellant has no rights to the land. Nor do we find that the Alaska Grazing Act gives any guarantee of approval of his allotment application, contrary to appellant's suggestion.

Appellant also urged that a State selection is subject to a native claim of occupancy. In certain factual situations, this is obviously so. See State of Alaska v. Udall, 420 F.2d 938 (1969), cert. denied, 397 U.S. 1076 (1970). We need not decide whether

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3/ Appellant's claim of occupancy since 1950 is burdened with inconsistencies. Although he submitted two affidavits of other parties reciting that the appellant had used the area for hunting and fishing "during the year 1950" and "during the years 1959 through 1963", these affidavits have little probative effect to establish the duration and intensity of the use.

The form (Form 2212-3 (June 1964)) on which appellant filed his application contains a number of questions.

Question No. 8a is: "From what date have you occupied the land applied for?" Appellant left the space following this question blank.

Question No. 9 is: "Is evidence of continuous use and occupancy of the land for a period of 5 years attached in triplicate?" Appellant checked the block, following the question, marked "No".

It is noteworthy that under the act of May 17, 1906 and 43 CFR 2212.9-4 (1968), now 43 CFR 2561.2, an applicant for a native allotment must make satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by him.

the State's selection application is precluded from approval on the issue of whether the selected lands in the case at bar are not "vacant unappropriated and unreserved" within the ambit of the Alaska Statehood Act, § 6(b), 72 Stat. 339 (1958), 48 U.S.C. note prec. § 21. Our finding that the filing of the State selection application as to the south portion was effective to segregate the land from other appropriations and the non-opening of the north portion to any appropriation other than State selection applications is dispositive of the case. See Annie K. Miller, Fairbanks 031861 (July 17, 1964).

In view of the foregoing it is unnecessary at this time to pass upon appellant's petition for cancellation of the grazing lease to the extent that it conflicts with his application. 4/

4/ The petition referred to is the one envisaged by the following regulation:

"§ 4131.3-1 Settlement, location, and acquisition.

"Lands leased under the act are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be cancelled or reduced in order to permit, in the public interest and without undue interference with the grazing operations, the appropriate development and utilization of the lands (see § 4131.2-7 (e)) and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition. An application on the appropriate form or a notice on a form approved by the Director if applicable to the class of entry contemplated, will be accepted and treated as a petition for determination. Upon such determination and after not less than 30 days' notice thereof to the lessee the grazing lease may be cancelled or reduced to permit the settlement, location, entry or other acquisition of the lands so eliminated from the lease, and the petitioner will be accorded a preference right to settle upon or enter the lands in accordance with the determination.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

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Frederick Fishman, Member

We concur:

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Martin Ritvo, Member

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Francis Mayhue, Member